



MAINE CIVIL LIBERTIES UNION

October 8, 2009

Hon. Lawrence Bliss, Senate Chair
Hon. Charles Priest, House Chair
Joint Standing Committee on Judiciary
13 State House Station
Augusta, Maine 04333

Re: An Act to Prevent Predatory Marketing Practices Against Minors (PL 2009, c. 230; LD 1183)

Senator Bliss, Representative Priest and members of the Judiciary Committee, on behalf of our 3,300 members state-wide, committed to advancing and preserving civil liberties in Maine through advocacy, education, and litigation, we thank you for the opportunity to offer comment on An Act to Prevent Predatory Marketing Practices Against Minors and appreciate the Committee's swift action in revisiting the law.

The First Amendment rights of freedom of speech and association are fundamental to our democracy. These rights apply strenuously to minors as well as to adults and to receipt as well as dissemination of speech. *Ernoznick v. City of Jacksonville*, 422 U.S. 212 (1975). Despite the good intentions of the Act's sponsors to protect minors' sensitive medical information from unscrupulous marketers, the resulting statute is overbroad and goes way beyond its original objectives, resulting in irreparable constitutional defects. Because we agree that the Act imposes content-based restrictions on speech insufficiently narrowly tailored to serve a compelling state interest, which if enforced or even if permitted to remain in statute, will result in unreasonable harm to covered minors, adults, and communication outlets both within and beyond Maine, we believe Public Law 2009, Chapter 230 should be repealed.

By prohibiting the collection, receipt, transfer or use of health and personal information from or about minors – the law prohibits young people from accessing or providing a wide variety of information that it is both beneficial, and more importantly, their right. The Act also violates the First Amendment rights of those seeking to communicate with people in Maine.

As Plaintiff's attested to in the related case of *Maine Independent College Association v. Mills*, the Act establishes public and private rights of action that will unconstitutionally chill businesses, colleges, healthcare providers, social networking sites and other groups from even attempting to communicate with Maine youth because of the threat of enforcement consequences. *See Mangual v. Rotger-Sabat, 317 F. 3d 45, 57 (1st Cir. 2003)*. Even Maine adults could face exclusion because it will be safer, cheaper, and technically easier to exclude *all* Mainers rather than risk violating the law. Obviously, this impermissible chilling effect in turn creates unconstitutional barriers for Maine youth and adults who would otherwise be *receiving* the wide range of information encompassed in the Act.

In addition to limiting or discontinuing provision of information to minors in Maine in order to ensure compliance and in violation of the First Amendment, the law could also create unintended negative consequences for privacy rights. As discussed in the comments submitted by the Center for Democracy and Technology, websites and other entities could end up seeking *more* personal information from users so as to ensure exclusion of Maine residents.

The law would also unconstitutionally limit minors' ability to access information about health topics like nutrition, sexually transmitted infections and pregnancy. It would also bar providers of such valuable information from reaching an audience of minors. Under the Act, fee-based health care services could only be provided with parental consent (otherwise they would be considered "marketing a service") and providers (such as suicide prevention hotlines and family planning clinics) would be prohibited from even asking a minor their name or health history if they then urged the minor to use condoms

or seek emergency hospital care. Finally, the Act's prohibition on predatory marketing is so broad as to prevent entities like health clinics and educational institutions from publicizing or promoting themselves.

The number and variety of unintended consequences resulting from the Act as passed is best addressed by repeal of the current law, enforcement of current applicable enforcement mechanisms, and the development over the coming year of legislation that addresses any holes in current statute. Such an approach acknowledges the valid concerns vocalized by the sponsors while respecting both the speech rights of Mainers and the rights of those seeking to reach them.